

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER

ITA No.4009/M/2023
Assessment Year: 2020-21

Shri Sanjiv Atmaram Sawant, 16A/30, 2 nd Floor, Jai Hind Building, Nagindas Master Road, Fort, Mumbai- 400 023 PAN: AACPS7694E	Vs.	Jurisdictional AO- Dy. Commissioner Income Tax- 16(3), Assessment Unit, Room No.446, Aaykar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by

: Shri Apurva Gandhi, A.R.

Revenue by

: Shri Manoj Kumar Singh, Sr. A.R.

Date of Hearing

: 02-08-2024

Date of Pronouncement

28-08-2024

O R D E R

Per: Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 15.05.2023, impugned herein, passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2020-21.

2. In the instant case, the Assessee had purchased a residential house i.e. flat No.1802, Desai Harmony, J.D. Ambekar Marg, Dadar (East), Mumbai - 400 031 for a total consideration of Rs.1,75,00,000/- during the assessment year under consideration, whereas the value of the property as per Stamp Duty Authority, was Rs.2,76,29,333/- and the property has been registered jointly in the names of the Assessee and his wife Ms. Nina Sanjiv Sawant and daughter Ms. Sanika Sawant . The Assessee, in order to establish his claim of exemption, furnished an allotment letter dated 29.01.2011 issued by M/s. Spark Builders and Infra Project Ltd. wherein the total consideration amount of Rs.1,75,00,000/- has been fixed and receipt of Rs.10,00,000/- as advance has also been shown as paid as booking advance through cheque No.378482 dated 29.1.2011 drawn on Oriental Bank of Commerce.

3. The Assessing Officer (AO), though considered the claim of the Assessee, however, not found the same as acceptable and ultimately vide Assessment Order dated 13-09-2022 added the amount of Rs. Rs.33,76,444/- being assessee's share i.e. one third of Rs. 1,01,29,333/- qua difference between the stamp duty value of the property purchased at Rs.2,76,29,333/- and the consideration of Rs.1,75,00,000/- paid, from other sources.

4. The Assessee, being aggrieved, challenged the said addition before the Ld. Commissioner, who ultimately affirmed the aforesaid addition by dismissing the appeal of the assessee.

5. The Assessee being aggrieved in appeal before us.

6. Having heard the parties and giving thoughtful considerations to the peculiar facts and circumstances of the case, we observe that the Ld. Commissioner rejected the claim of the assessee mainly on the grounds inter-alia: "That allotment letter dated 22.12.2014 merely stated that flat No.1802 was allotted, there was no promise and set of promises forming the consideration for each other and hence it cannot be said to be an agreement, as the promise and set of promises forming the consideration for each other were there in the agreement for sale dated 06.11.2019 only. Therefore, respectively, following the judgment of Hon'ble Supreme Court in Sanjeev Lal Vs, CIT (2014)365 ITR 389(SC) it is held that extinguishment of rights took place by this agreement only and not by the allotment letter and accordingly the transfer took place on 06.11.2019 only and not 22.12.2014. Secondly, the difference is of Rs.1,01,29,333/3 which is more than 5% of the sales consideration, therefore section 56(2)(x) of the Act is attracted. Thirdly, even the first proviso to section 56(2)(x) of the Act should be applied, is accepted, even then it does not help the Assessee because of the fact that the letter of allotment does not qualify to be agreement and the agreement is the one of 06.11.2019. Fourthly, the date on which stamp duty value as well as market value to be taken is date of agreement i.e. 06.11.2019 and there is no variation between the values in this case, therefore the AO's not making reference to valuation officer, does not affect the assessment adversely.

6.1 We perused the letter of allotment dated 22.12.2014 issued by M/s. Spark Builders and Infra Project Ltd., wherefrom it appears that as per request of the assessee and his wife, flat No.1802 on 18th floor admeasuring 1317.62 sq. ft. carpet area in the building known as "Desai Harmony" was allotted on a consideration of Rs.1,75,00,000/- only. In addition to that, 02 car parking spaces were also allotted.

From the receipt dated 26.12.2014 issued by the said builder M/s. Spark Builders and Infra Project Ltd. it appears that the builder had received the amount of Rs.10,00,000/- {vide cheque No.856019 dated 22.12.2014 drawn on Corporation Bank}, for booking of aforesaid flat No.1802 (supra). Further, from the bank statement account No.060100101001515 maintained with Corporation Bank by the Assessee, it clearly reflects that on 24.12.2014, the amount of Rs.10,00,000/- has been debited from the account of the assessee and credited in the account of M/s. Spark Builders and Infra Project Ltd. It is the mandate of first proviso to section 56(2)(x) of the Act, that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, then the stamp duty value on the date of agreement may be taken for the purpose of sub-clause and therefore agreement fixing the total consideration amount vide allotment letter dated 22.12.2014 coupled with copy of bank statement reflecting the debit of advance payment of Rs.10,00,000/- on 24.12.2014, acknowledgment of receipt of advance of Rs.10,00,000/- dated 26.12.2014 and sale deed dated 06.11.2019 executed in pursuance to the Allotment letter, strengthen the case of the Assessee qua consideration of stamp duty value, as on the date of allotment letter or fixing the sale price .

6.2 Issue with regard to the treatment of allotment letter as "Agreement fixing the sale price" has been considered by various courts including by the Hon'ble jurisdictional High Court in the case of in the case of PCIT-3 Vs. Vembo Vaidyanathan (2019) 261 taxman 376 (Bom.) wherein the Hon'ble Court dealt with the identical issue and approved the acquisition of property from the date of "letter of allotment" and infact directly or indirectly given sanctity to the letter of allotment" by holding as under:

“Issue raised by the revenue in its appeal before the Hon'ble High Court was, as to whether the Tribunal was justified in reckoning the acquisition of the property from the date of letter of allotment which though did not lead to creation of any proper and effective right over the capital asset, and not from the date on which the agreement" which spelled out the exact terms and conditions for acquisition was executed. It was observed by the Hon'ble High Court, that the CBDT vide its Circular No. 471, dated 15.10.1996 had clarified that when an Assessee purchases a flat to be constructed by Delhi Development Authority (D.D.A) for which allotment letter is issued, date of such allotment would be the relevant date for the purpose of capital gain tax as the date of acquisition. Further, referring to the clarification issued by the CBDT, vide its Circular No. 672, dated 16.12.1993, it was observed by the Hon'ble High Court, that the Board had clarified that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions were similar to the terms of allotment and construction by D.D.A, then on the same basis the acquisition of the property was to be related to the date on which the allotment letter was issued. On the basis of its aforesaid observations, the Hon'ble High Court had dismissed the appeal of the revenue. In the backdrop of our aforesaid deliberations, we are of the considered view that as no infirmity emerges from the order of the CIT(A), who we find had rightly concluded that the date of acquisition of the property under consideration was to be reckoned from the date of the allotment letter i.e. 03.12.1999, therefore, we uphold his order.”

6.3 The Hon'ble Punjab & Haryana High Court, Chandigarh in the case of Ms. Madhu Kaul Vs. CIT, Chandigarh (ITA No. 89/1999 decided on 17.01.2014) also dealt with the allotment letter, for determining the Long-Term Capital Gain and by holding that the payment of balance installments, identification of particular flat and delivery of possession are consequential acts that relate back to and arise from the rights conferred by the “allotment letter”, determined as under:

“13. On careful reading of the Circular issued by the Board, para 2 thereof describes the nature of right that an allottee acquires on allotment of flat under Self-Financing Scheme. According to it, the allottee gets title to the property on the issuance of an allotment letter and the payment of installments is only a consequential action upon which the delivery of possession flows. Admittedly, the flat was allotted to the appellant on 07.06.1986, vide letter conveyed to the Assessee on 30.06.1986. The Assessee paid the first installment on 04.07.1986,

thereby conferring a right upon the appellant to hold a flat, which was later identified and possession delivered on a later date. The mere fact that possession was delivered later, does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. The payment of balance installments, identification of a particular flat and delivery of possession are consequential acts, that relate back to and arise from the rights conferred by the allotment letter.

In view of what has been recorded hereinabove, we have no hesitation in holding that the Income Tax Appellate Tribunal has erred in holding that the transaction does not envisage a long term capital gain. Consequently, we allow the appeal, set aside order dated 15.02.1999 and answer the substantial questions of law in favour of the Assessee."

6.4 On the aforesaid analyzations and the dictum laid down by the Hon'ble High Courts, we do not have any hesitation to hold that for consideration of the holding period of the property or for determination of LTCG, the date of the "allotment of property" is also paramount and the payment of installments/consideration, delivery of possession and execution of sale deed etc. are infact consequential acts in pursuance to allotment letter and/or originates from the date of "allotment letter" and therefore the same can be considered for determining the stamp duty value u/s 56(2)(x) as relevant .

6.5 Even otherwise, the then Ld. CIT(A) in the case of Ms. Sanika Sawant (Assessee's daughter) has also dealt with the same set of facts and allotment letter dated 22.11.2014 as well as sale deed dated 06.11.2019 as involved in the instant case and considered the allotment letter as agreement for fixing the amount and ultimately allowed the identical claim as raised by the Assessee in this case. For clarity and ready reference, the conclusion drawn by the then Ld. CIT(A) is reproduced herein below:

“5.3.12 I have considered the submissions of the appellant. The same were forwarded to the assessing officer for comments/remand report but the assessing officer has not submitted the report. Hence, the issue is being decided based on the case record and evidences relevant to the matter. It is noted that the company M/s Spark Builders and Infra Projects Pvt Ltd has merged into M/s Desai Residency Pvt Ltd vide order dated 29.08.2019 of the NCLT Mumbai Bench. Further it is noted that the appellant had undoubtedly paid Rs.10,00,000/- to M/s Spark Builders and Infra Projects Pvt Ltd on 12.12.2014 for part payment towards booking of Flat No. 1802, in building Desai Harmony, GD Ambedkar Marg, Mumbai for which the company had duly issued allotment letter for a total sale consideration of Rs. 1,75,00,000/-.

5.3.13 The assessing officer has failed to appreciate that the company M/s Spark Builders and Infra Projects Pvt Ltd was duly involved in the redevelopment of Glass Factory, Chawl which houses the building Desai Harmony in which the property of the appellant is situated. Further, the assessing officer has wrongly held that the appellant is the 100% shareholder whereas all the documents clearly mention that the appellant is co-owner alongwith her parents Mr. Sanjiv Atmaram Sawant and Mrs. Neena Sanjiv Sawant. This clearly implies that the share of the appellant is 1/3rd only in the said property.

5.3.14 It is further noted that the first and second proviso of section 56(2)(x) are clearly attracted in the case of the appellant as the allotment letter dated 22.12.2014 issued by M/s Spark Builders and Infra Projects Pvt Ltd clearly spell out that the total sale consideration of unit Flat No.1802, in Desai Harmony, GD Ambedkar Marg, Mumbai shall be Rs.1,75,00,000/- against which an amount of Rs. 10,00,000/- has been paid as part consideration vide Corporation Bank bearing Cheque No.856019. Hence, the date of agreement fixing the amount of consideration for transfer of immovable property as per first proviso of section 56(2)(x) in this case is held to be 22.12.2014 and the date of registration is 06.11.2019. Since, the part amount of consideration i.e. Rs. 10,00,000/- has been paid by cheque No.856019 dated 22.12.2014 of Corporation Bank hence the second proviso to section 56(2)(x) is clearly applicable to the facts of the appeal.

5.3.15 As a result of the discussion in the preceding paras and the facts of the issue, I am of the considered opinion that the assessing officer has wrongly held that the first and second proviso of section 56(2)(x) are not applicable. Further, the assessing officer has erred in assessing the income from other sources in the hands of the appellant on 100% shareholding basis.

5.3.16 The plea of the appellant that the difference between the stamp duty value of the property as on 22.12.2014 and the sale consideration, being less than 10% the same may be ignored, is not tenable as the section 56(2)(x) clearly lays down that the excess of stamp duty value from the sale consideration is taxable if the excess is more than 5% of the sale consideration. In this case the apparent difference between the stamp duty value of the property as on 22.12.2014 and the sale consideration of the property is more than 5%. Hence, the same is taxable. The reliance of the appellant on the various judicial pronouncements is misplaced as the same are on different set of facts and in the context of section 50C and not 56(2)(x).

5.3.17 The assessing officer is directed to consider the stamp duty value of the property as on 22.12.2014 as Rs.1,88,00,000/- as submitted by the registered valuer and to consider the sale consideration of the property as Rs. 1,75,00,000/- as per the provisions of section 56(2)(x). Further, the difference between the two values is to be assessed in the hands of the appellant with respect to her share only i.e. the 1/3rd difference between the stamp duty value of the property as on 22.12.2014 and the sale consideration of the property is to be added under the income from other sources in the hands of the appellant. The appellant gets relief to the extent above.

{highlighted by us for clarity}

5.3.18 In view of this the addition of Rs. 1,01,29,333/- done by the assessing officer is hereby modified to the extent as per para 5.3.17 above. As a result, the grounds No. 1, 2, 3, 4 and 5 are partially allowed.

5.4 Ground No.6

This ground is found to be general in nature. During the course of the appellate proceedings, the appellant has not added, altered or

amended any of the grounds of appeal. Thus, there is no specific issue in this ground of objection, which requires adjudication. Hence Ground No.6 of the present appeal is dismissed.

6. In the result, the appeal filed by the appellant is treated as Partly Allowed.”

6.6 The then Ld. CIT(A) in the para 5.3.17 of the order referred to above, ultimately directed the AO to consider the stamp duty value of the property as on 22.12.2014 as Rs.1,88,00,000/- as valued by the Registered Valuer and the sale consideration of the property as Rs.1,75,00,000/- as per the provisions of section 56(2)(x) of the Act. Further, the difference between the two values is to be assessed in the hands of the Assessee with respect to her share only i.e. 1/3rd of difference between the stamp duty value of the property as on 22.12.2014 and the sale consideration of the property and is to be added under the head “Income from other sources”. Therefore, in view of the decision of the then Ld. CIT(A) in the case of the Assessee’s daughter referred to above and the rule of consistency, the case of the Assessee is also liable to be allowed on same footing.

6.7 Thus, the AO is directed to consider the stamp duty value of the property as on 22.12.2014 as Rs.1,88,00,000/- as valued by the Registered Valuer and the sale consideration of the property as Rs.1,75,00,000/- as per the provisions of section 56(2)(x) of the Act and add 1/3 of the difference between the two values i.e. Rs. 13,00,000/- (Rs. 188,00,000/- - Rs.1,75,00,000/-) in the hands of the Assessee under the head “Income from other sources”, as done by the then CIT(A) in the case of the Assessee’s daughter. Consequently, the addition under consideration is modified accordingly.

7. In the result, the appeal of the Assessee is partly allowed.

Order pronounced in the open court on 28.08.2024.

Sd/- (RATNESH NANDAN SAHAY) ACCOUNTANT MEMBER	Sd/- (NARENDER KUMAR CHOUDHRY) JUDICIAL MEMBER
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* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.